OHIO DEPARTMENT OF MEDICAID
DATA SHARING AND CONFIDENTIALITY AGREEMENT

D-1819-00-0000

This Data Sharing and Confidentiality Agreement (Agreement) is entered into by and between the Ohio Department of Medicaid (ODM) and Vendor Name (Vendorname).

ARTICLE I. PURPOSE AND LEGAL AUTHORITY

A.   This Agreement is entered into for the purpose of [INSERT DATA USES, AUTHORITY FOR RELEASE, DISCLOSURE TO OTHERS].

[Vendorname may only use or disclose the data in the performance of the following activities/duties: INSERT]

[Vendorname may, in accordance with the terms and conditions of _____ (i.e. ODM/ODA Interagency Agreement #) use or disclose protected health information.]

B.   The authority to release this data is found in Title 42 of the Code of Federal Regulations (CFR), specifically 42 CFR 431.300, 431.302, 431.304, 431.305 431.306, 435.945; Privacy regulations 45 CFR 164.502(e); 164.504(e) and security regulations 45 CFR 164.308, 164.314 issued pursuant to the Health Insurance Portability and Accountability Act [42 USC 1320d. 1320d-8]; relevant amendments effected by the American Recovery and Reinvestment Act of 2009 [Pub. L. 111-5, §§ 13400, *et seq.*], the terms of this Agreement, or more stringent provisions of the law, rules, or regulations of the State of Ohio.

C.   The parties agree that any data or records provided under this Agreement may only be used or disclosed in accordance with Medicaid regulations.

D.   The Agreement Manager for ODM is ODM Agreement Manager or successor.

ARTICLE II. DESCRIPTION OF RECORDS
TO BE PROVIDED TO OR ACCESSED BY VENDORNAME

[INSERT DATA TO BE SHARED OR EXCHANGED: SOURCE, SPECIFIC DATA FIELDS OR LIMITATIONS, METHOD OF TRANSMISSION]

[Vendorname shall have the minimal amount of access to protected health information records necessary to perform the work required under this Agreement, transmitted in a secure, HIPAA-compliant manner.]

ARTICLE III. CONFIDENTIALITY OF INFORMATION

A.   Vendorname agrees that it shall not use any information, systems, or records made available to it for any purpose other than to fulfill the obligations specified herein. Vendorname specifically agrees to comply with state and federal confidentiality and information disclosure laws, rules, and regulations applicable to programs under which this Agreement exists, including, but not limited to:

1.   United States Code, 42 USC 1320d through 1320d-8 (HIPAA);
2.   Code of Federal Regulations, 42 CFR 431.300, 431.302, 431.305, 431.306, 435.945, 45 CFR 164.502(e), 164.504(e), and 162.100;
3.   Ohio Revised Code, ORC 173.20, 173.22, 2305.24, 2305.251, 2305.252, 3701.243, 3701.028, 4123.27, 5101.26, 5101.27, 5160.39, 5160.45, 5168.13, and 5165.88; and
4.   Corresponding Ohio Administrative Code rules.

B.   Vendorname agrees that any data created, received, maintained or transmitted on behalf of ODM by Vendorname] shall be returned to ODM not later than 90 calendar days following termination of this Agreement and shall certify that no copies of source data were retained by Vendorname, unless as may be otherwise provided for in this Agreement or by law. [If any conflict exists between this Agreement and the agreement referenced in ARTICLE I, Section A, this Agreement controls.]

C.   Vendorname shall implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of the paper and/or electronic protected personal data and health information that it creates, receives, maintains, or transmits on behalf of ODM against use or disclosure not provided for by this Agreement.

D.   Vendorname agrees that access to the records and data provided by ODM and described in ARTICLE II will be restricted to only those authorized employees, officials, subcontractors, and other persons who need it to perform duties related to this Agreement. Vendorname agrees to provide the ODM Agreement Manager with a complete listing of any and all such persons who shall have access to the above referenced records and/or data.

E.   Vendorname agrees that the above records and/or data and any records, reports, databases, and/or other derivative documents created from the information provided under this Agreement shall be stored in an area that is physically safe from access from unauthorized persons during duty and non-duty hours. Information provided under this Agreement shall be protected electronically to prevent unauthorized access by computer, remote access, or any other means. Vendorname expressly agrees that no records will be accessed, tested, maintained, backed up or stored outside of the United States.

F.   Vendorname shall assure that all persons who have access to the above referenced information shall be fully apprised as to the confidential nature of the information, the safeguards required to protect the information, and the applicable civil and criminal sanctions and penalties associated with any intentional or non-intentional disclosure. No subcontractor shall receive any information without a written agreement with Vendorname incorporating these assurances.

G.   Vendorname shall not disclose any of the above referenced information to any third party without the specific written authorization of the Director of ODM.

H.   Vendorname shall permit onsite inspection by the State of Ohio (including but not limited to ODM, the Auditor of the State of Ohio, the Inspector General of Ohio, the Ohio Attorney General or any duly authorized law enforcement officials) and by agencies of the United States government.

I.   ODM will prepare data pursuant to the security and encryption standards found in Ohio IT Standard ITS-SEC-01, Data Encryption and Cryptography; and NIST Special Publication 800-53. Vendorname shall prepare, store, and transmit all sensitive data relating to the state of Ohio in accordance with Ohio IT Standard ITS-SEC-01, Data Encryption and Cryptography; State of Ohio Administrative Policy IT-14, Data Encryption and Securing Sensitive Data; and NIST Special Publication 800-53.

J.   Vendorname shall comply with Ohio Administrative Policy IT-04, Use of Internet, E-mail and Other IT Resources, as well as any associated agency policies prior to gaining access to statewide and ODM IT resources.

K.   The express terms and conditions of this Article shall be included in all subcontracts executed by Vendorname for any and all work under this Agreement.

ARTICLE IV. TIME OF PERFORMANCE

A.   This Agreement shall be in effect upon execution by the Director of ODM, until _____ [concurrent with the agreement referenced in ARTICLE I, Section A], unless this Agreement is suspended or terminated pursuant to ARTICLE VI prior to the termination date.

B.   The Confidentiality and Business Associate provisions of this Agreement shall survive the termination of this Agreement.

ARTICLE V. COST OF DATA PREPARATION

The parties agree that no reimbursement will be sought under the terms of this Agreement.

ARTICLE VI. SUSPENSION AND TERMINATION

A.   Upon 30 calendar days' written notice to the other party, either party may terminate this Agreement.

B.   Notwithstanding Section A of this Article, ODM may suspend or terminate this Agreement immediately upon delivery of written notice to Vendorname, if ODM discovers any illegal conduct on the part of Vendorname or if there is any breach of the confidentiality provisions of ARTICLE III or ARTICLE XI herein.

C.   Notice of termination or suspension under either Section A or B of this Article must be sent to: the ODM Chief Legal Counsel, 50 West Town Street, Columbus, Ohio 43215; and to Vendorname's representative at the address appearing on the signature page of this Agreement.

ARTICLE VII. BREACH OR DEFAULT

A.   Upon breach or default of any of the provisions, obligations or duties embodied in this Agreement, ODM may exercise any administrative, contractual, equitable or legal remedies available, without limitation. The waiver of any occurrence of breach or default is not a waiver of subsequent occurrences, and ODM retains the right to exercise all remedies hereinabove mentioned.

B.   If either of the parties fails to perform an obligation or obligations under this Agreement and thereafter such failure(s) is (are) waived by the other party, such waiver shall be limited to the particular failure(s) so waived and shall not be deemed to waive other failure(s) hereunder. Waiver by ODM shall not be effective unless it is in writing signed by the ODM Director.

ARTICLE VIII. AMENDMENTS

This Agreement may be modified or amended provided that any such modification or amendment is in writing and is signed by the Director of ODM and Vendorname. It is agreed, however, that any amendments to laws, rules, or regulations cited herein will result in the correlative modification of this Agreement, without the necessity for executing a written amendment.

ARTICLE IX. INDEPENDENT CONTRACTOR

Vendorname agrees that no agency, employment, joint venture, or partnership has been or will be created between the parties hereto pursuant to the terms and conditions of this Agreement. Vendorname also agrees that, as an independent contractor, it assumes all responsibility for any federal, state, municipal, or other tax liabilities along with workers compensation, unemployment compensation, and insurance premiums which may accrue as a result of compensation received for services or deliverables rendered hereunder. Vendorname agrees that it is an independent contractor for all purposes including, but not limited to, the application of the Fair Labor Standards Act, the Social Security Act, the Federal Unemployment Tax Act, the Federal Insurance Contribution Act, provisions of the Internal Revenue Code, Ohio Tax law, Workers Compensation law, and Unemployment Insurance law. Vendorname certifies that all approvals, licenses, or other qualifications necessary to conduct business in Ohio have been obtained and are operative. If at any time during the contractual period Vendorname becomes disqualified from conducting business in Ohio, for whatever reason, Vendorname must immediately notify ODM of the disqualification and will immediately cease performance of its obligations hereunder.

ARTICLE X. LIMITATION OF LIABILITY

To the extent allowable by law, Vendorname agrees to defend, indemnify and hold ODM, its officials, employees and agents harmless from and against any and all liability, loss and expense (including reasonable attorneys' fees) or claims for personal injury, property damage, patent and copyright infringement, or for any liability or claims under ARTICLE XI, Business Associate Requirements Under HIPAA, below, and/or any other type of claim that arises from the performance under this Agreement. Vendorname's sole and exclusive remedy for any ODM failure to perform under this Agreement will be an action in the Ohio Court of Claims pursuant to ORC Chapter 2743 that will be subject to the limitations set forth in this Article. In no event will ODM be liable for any indirect or consequential damages, including loss of profits, even if ODM knew or should have known of the possibility of such damages. To the extent that ODM is a party to any litigation arising out of or relating in any way to this Agreement or the performance thereunder, such an action shall be brought only in a court of competent jurisdiction in Franklin County, Ohio. Subject to ORC 109.02, Vendorname agrees to defend ODM against any such claims or legal actions if called upon by ODM to do so.

[PUBLIC ENTITY] Each party agrees to be responsible for any of its own negligent acts or omissions or those of its agent, employees, or subcontractors. Each party further agrees to be responsible for its own defense and any

judgments and costs that may arise from such negligent acts or omissions. Nothing in this Contract will impute or transfer any such liability or responsibility from one party to the other. To the maximum extent permitted by law, the parties' liability for damages, whether in contract or in tort, may not exceed the actual amount of direct damages incurred by any party. In no event will either party be liable for any indirect or consequential damages, including loss of profits, even if a party knew or should have known of the possibility of such damages.

ARTICLE XI. BUSINESS ASSOCIATE REQUIREMENTS UNDER HIPAA

A.   The definitions contained in this section are derived from federal law. Should there be any conflict between the meanings assigned in this Agreement and the meanings defined in applicable federal law (even in the event of future amendments to law that create such conflict), the definitions found in federal law will prevail.

    1.   **General Definitions.** The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Required by Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information and Use.

    2.   **Specific Definitions.**

        a.   HIPAA means the Health Insurance Portability and Accountability Act of 1996, the American Recovery and Reinvestment Act of 2009 (ARRA) and any other applicable federal statute or regulation.

        b.   HIPAA Rules shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 CFR Part 160 and Part 164.

        c.   Covered Entity means a health plan, a health care clearinghouse, or health care provider under 45 CFR 160.103.

        d.   Business Associate means a person or entity that, on behalf of the Covered Entity, maintains, performs, or assists in the performance of a function or activity that involves the use or disclosure of "Protected Health Information" under 45 CFR 160.103.

        e.   Protected Health Information (PHI) means individually identifiable information including but not limited to the past, present or future physical or mental health or condition of an individual, provision of health care to an individual, or the past, present or future payment for health care provided to an individual, as more fully defined under 45 CFR 164.501 and any amendments thereto, received or sent on behalf of ODM.

B.   Vendorname acknowledges that ODM is a Covered Entity under HIPAA. Vendorname further acknowledges that it is a Business Associate of ODM, and, in carrying out the work described in this Agreement, agrees to comply with all of the following provisions:

    1.   **Permitted Uses and Disclosures.** Vendorname will not use or disclose PHI except as provided in this Agreement or as otherwise required under HIPAA regulations or other applicable law.

    2.   **Safeguards.** Vendorname will implement sufficient safeguards, and comply with Subpart C of 45 CFR Part 164 pertaining to electronic PHI to prevent the use or disclosure of PHI other than as provided for under this Agreement. Safeguards will be implemented for all paper and electronic PHI created, received, maintained, or transmitted on behalf of ODM.

    3.   **Reporting of Disclosures.** Vendorname agrees to promptly report to ODM any inappropriate use or disclosure of PHI that is not in accordance with this Agreement or applicable law, including breaches of unsecured protected health information as required at 45 CFR 164.410 and any security incident Vendorname has knowledge of or reasonably should have knowledge of under the circumstances.

Further, Vendorname shall report to ODM the following:

a.   Any use or disclosure of PHI which is not in compliance with the terms of this Agreement or applicable law of which it becomes aware; and

b.   Any security incident of which it becomes aware. For purposes of this Agreement, "security incident" means the unauthorized access, use, disclosure, modification, or destruction of information or interference with system operations in an information system.

As soon as is practical following of discovery of a reportable security incident, Vendorname shall notify ODM of the existence and nature of the incident as understood at that time. Vendorname shall immediately investigate the incident and within 24 hours of discovery shall provide ODM, in writing, a report describing the status and any results of Vendorname's investigation.

Reporting and other communications made to ODM under this section must be made to ODM's HIPAA privacy officer and Office of Legal Counsel at: PrivacyOffice@medicaid.ohio.gov and Mcdlegal@medicaid.ohio.gov

4.   **Mitigation Procedures.** Vendorname agrees to coordinate with ODM to determine specific actions that will be required of the Business Associates for mitigation, to the extent practical, of the breach. These actions will include notification to the appropriate individuals, entities, or other authorities. Notification or communication to any media outlet must be approved, in writing, by ODM prior to any such communication being released. Vendorname will report all of its mitigation activity to ODM and shall preserve all relevant records and evidence.

5.   **Incidental Costs.** Vendorname shall bear the sole expense of all costs to mitigate any harmful effect, of any breaches or security incidents of which Vendorname has knowledge which are directly caused by the use or disclosure of protected health information by Vendorname in violation of the terms of this Agreement. These costs will include, but are not limited to, the cost of investigation, remediation and assistance to the affected individuals, entities or other authorities.

6.   **Agents and Subcontractors.** Vendorname, in compliance with 45 CFR 164.502(e)(1)(ii) and 164.308(b)(2) as applicable, will ensure that all its agents and subcontractors that create, receive, maintain, or transmit PHI from or on behalf of Vendorname and/or ODM agree to have, in a written agreement, the same restrictions, conditions, and requirements that apply to Vendorname with respect to the use or disclosure of PHI.

7.   **Accessibility of Information.** Vendorname will make available to ODM such information as ODM may require to fulfill its obligations to provide access to, provide a copy of any information or documents with respect to PHI pursuant to HIPAA and regulations promulgated by the United States Department of Health and Human Services, including, but not limited to, 45 CFR 164.524 and 164.528 and any amendments thereto.

8.   **Amendment of Information.** Vendorname shall make any amendment(s) to PHI as directed by, or agreed to, by ODM pursuant to 45 CFR 164.526,or take other steps as necessary to satisfy ODM's obligations under 45 CFR 164.526. In the event that Vendorname receives a request for amendment directly from the individual, agent, or subcontractor, Vendorname will notify ODM prior to making any such amendment(s). Vendorname's authority to amend information is explicitly limited to information created by Vendorname.

9.   **Accounting for Disclosure.** Vendorname shall maintain and make available to ODM or individuals requesting the information as appropriate, records of all disclosures of PHI in a Designated Record Set as necessary to satisfy ODM's obligations under 45 CFR 164.528. For every disclosure the record will include, at a minimum, the name of the individual who is the subject of the disclosure, the date of the disclosure, reason for the disclosure if any, and the name and address of the recipient to which the protected health information was disclosed.

10.   **Obligations of ODM.** When Vendorname is to carry out an obligation of ODM under Subpart E of 45 CFR 164, Vendorname agrees to comply with all applicable requirements of Subpart E that would apply to ODM in the performance of such obligation.

11. **Access to Books and Records.** Vendorname shall make available to ODM and to the Secretary of the U.S. Department of Health and Human Services any and all internal practices, documentation, books, and records related to the use and disclosure of PHI received from ODM, or created or received on behalf of ODM. Such access is for the purposes of determining compliance with the HIPAA Rules.

12. **Material Breach.** In the event of material breach of Vendorname's obligations under this Article, ODM may immediately terminate this Agreement as set forth in ARTICLE VI, Section B. Termination of this Agreement will not affect any provision of this Agreement, which, by its wording or its nature, is intended to remain effective and to continue to operate after termination.

13. **Return or Destruction of Information.** Upon termination of this Agreement and at the request of ODM, Vendorname will return to ODM or destroy all PHI in Vendorname's possession stemming from this Agreement as soon as possible but no later than 90 days, and will not keep copies of the PHI except as may be requested by ODM or required by law, or as otherwise allowed for under this Agreement. If Vendorname, its agent(s), or subcontractor(s) destroy any PHI, then Vendorname will provide to ODM documentation evidencing such destruction. Any PHI retained by Vendorname will continue to be extended the same protections set forth in this Section, HIPAA regulations and this Agreement for as long as it is maintained.

14. **Agency Indemnification.** Business Associate hereby indemnifies ODM and agrees to hold ODM harmless from and against any and all losses, expense, damage or injury that ODM may sustain as a result of, or arising out of, Business Associate, or its agent's or subcontractor's, unauthorized use or disclosure of PHI.

15. **Survival**. These provisions shall survive the termination of this Agreement.

ARTICLE XII. CONSTRUCTION

This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of Ohio. Should any portion of this Agreement be found to be unenforceable by operation of statute or by administrative or judicial decision, the operation of the balance of this Agreement is not affected thereby; provided, however, the absence of the illegal provision does not render the performance of the remainder of this Agreement impossible.

ARTICLE XIII. COUNTERPART

This Agreement may be executed in one, or more than one counterpart, and each executed counterpart shall be considered an original, provided that such counterpart is delivered to the other party by facsimile, mail courier or electronic mail, all of which together shall constitute one and the same agreement.

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OHIO DEPARTMENT OF MEDICAID
DATA SHARING AND CONFIDENTIALITY AGREEMENT
Signature Page

D-1819-00-0000

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of the signature of the Director of the Ohio Department of Medicaid.

Vendor Name   Ohio Department of Medicaid

_____   _____
Authorized Signature (Blue Ink Please)   Barbara R. Sears, Director

_____   _____
Printed Name   Date

_____   50 West Town Street
Date   Columbus, Ohio 43215

Address
City, State, Zip